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No. _____

In The

Supreme Court of the United States

October Term, 1993

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM L. KELLER
Counsel of Record

CLARK, WEST, KELLER, BUTLER & ELLIS, L.L.P.
4800 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2146
Telephone: (214) 741-1001
Facsimile: (214) 760-9812

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the National Labor Relations Board's *per se* rule and remedial order, which require an employer to notify the union that it is considering closing a plant and then to engage in effects bargaining until an agreement is reached or to impasse prior to implementing that decision to close, impermissibly infringe upon an employer's right to unilaterally make and implement managerial decisions which lie at the core of entrepreneurial control?

2. Was the National Labor Relations Board's decision supported by substantial evidence on the records of the whole?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This Petition seeks review of the *per curiam* judgment and opinion of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") enforcing an order of the National Labor Relations Board ("Board"). The Petitioner has contended before the Board and the Fifth Circuit that the Board's *per se* requirement that an employer first give notice of its intention to close a plant and then engage in meaningful negotiations with a union for some undetermined length of time over the effects of any such closure prior to the actual implementation of the decision to close, impermissibly infringes upon employer's right to

unilaterally make and implement entrepreneurial decisions regarding the scope and direction of its enterprise as established by this Court in *First National Maintenance Corporation v. National Labor Relations Board*, 452 U.S. 666 (1981). The Board and the Fifth Circuit have summarily dismissed Petitioner's arguments. The Board adopted the Administrative Law Judge's ("ALJ") findings in a short-form decision and the Fifth Circuit entered a *per curiam* opinion enforcing the Board's order. The Fifth Circuit later denied Petitioner's Motion to Stay the Mandate issued by that Court while Petitioner sought this Court's review.

JURISDICTION

This Court has jurisdiction to review the opinion and judgment of the Fifth Circuit pursuant to 28 U.S.C. § 1254. The opinion and judgment of the Fifth Circuit enforcing the order of the Board was entered on April 12, 1993. This Petition is filed within 90 days of that date as required by 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158 provides in pertinent part:

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees. . . .

29 U.S.C. § 160(e) provides in pertinent part:

> The Board shall have power to petition any Court of Appeals of the United States . . . wherein the unfair labor practice in question occurred . . . for the enforcement of such order and/or appropriate temporary belief or restraining order. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals . . . and by the Supreme Court of the United States upon Writ of Certiorari or certification as provided in § 1254 of Title 28.

STATEMENT OF THE CASE

Respondent ARA is an unincorporated division of Reeves Brothers, Inc. ("Reeves"), a Delaware corporation. Reeves' principal place of business is located in Spartanburg, South Carolina. ARA's principal place of business, and the facility involved in this case, was located in Grand Prairie, Texas, where, until October 1, 1990, ARA was engaged in the manufacture of automotive air conditioning equipment.

On September 28, 1990, at 3:00 p.m., the Board of Directors of Reeves held a meeting in Darien, Connecticut. During that meeting, as established by the minutes:

> The Board reviewed the events of the past two weeks during which the senior management of ARA Automotive Group made detailed presentations in Connecticut on ARA's performance during August and September, 1990. The Board reviewed, among other things, the severe, unexpected drop in sales commencing in August and the reasons therefor, the revised projections that had been presented for ARA's business for the balance of 1990 and the impact of events in the Middle East on ARA's business and the U.S. economy. The Board also discussed various alternatives in lieu of ceasing operations at ARA and terminating production. The Board then considered an appropriate course of action with respect to ARA under the foregoing circumstances.
>
> Upon motion duly made and seconded, it was unanimously RESOLVED, that the Board of Directors has determined that it was in the best interest of Reeves Brothers that all manufacturing operations at ARA Automotive Group cease effective immediately and corresponding reductions in salaried and support personnel be implemented. . . .

At 9:26 p.m. Eastern Standard Time, that same day, September 28, 1990, ARA sent Western Union mailgrams to each active member of the local Union advising them:

> As a result of recent events in the Middle East causing significant changes [in] the prevailing economic conditions in the United States and a severe drop in ARA sales during August and September, 1990, all ARA plant employees have been placed on indefinite layoff effective immediately.

> You should therefore not report to work until further notice.
>
> [W]e will be meeting with your Union representatives to discuss other details of your employment and you will be advised accordingly.

September 28, 1990, was a Friday. No members of the Union were scheduled to work that weekend, September 29 and 30. The mailgrams were received by the local Union members, including Tom Mauer, President of Union Local 300, on Saturday, September 29, 1990. ARA also sent certified letters to the Union leadership explaining the sudden, severe and unforeseen economic circumstances which required the Reeves Board to make the difficult decision to cease manufacturing operations at the ARA plant effective that Monday, October 1, 1990. Mr. Pat Walsh, the ARA Vice President for Corporate Administration, hand-delivered a copy of this letter to Smith Harris, the regional representative of the Union on Monday, October 1, 1990.

The Union was not available for bargaining until Monday, October 1, 1990. Mr. Harris and Mr. Walsh arranged a meeting to engage in effects bargaining, and commencing at 10:00 a.m. that same day, October 1, 1990, ARA representatives began to engage in effects bargaining with the Union representatives. Moreover, ARA and the Union representatives agreed to meet the next day to negotiate further on the issue, and subsequently engaged in effects bargaining on October 2, 1990, October 5, 1990, and at various times thereafter.

The plant did not fully close on September 28, 1990. Approximately 21 bargaining unit employees, selected on

the basis of seniority, continued for some undetermined period of time to perform various kinds of work related to the closing. The record evidence is incomplete in that it does not show any date when the plant might have been fully shut down or when these employees might have been terminated.

REASONS FOR GRANTING THE WRIT

I. THE NATIONAL LABOR RELATIONS BOARD'S *PER SE* RULE REQUIRING EFFECTS BARGAINING UNTIL AN AGREEMENT IS REACHED OR TO IMPASSE PRIOR TO THE IMPLEMENTATION OF AN ENTREPRENEURIAL DECISION REGARDING THE SCOPE AND DIRECTION OF AN EMPLOYER'S ENTERPRISE, EFFECTIVELY EVISCERATES THIS COURT'S HOLDING IN *FIRST NATIONAL MAINTENANCE CORPORATION V. NATIONAL LABOR RELATIONS BOARD*, 452 U.S. 666 (1981)

Few cases, as evidenced by this Court's prior decisions, ever present basic questions as crucial to the nations entire business community as the question presented herein – the right of an employer to cease operations because of rapidly deteriorating business conditions.

This Court has long proclaimed an employer's right to unilaterally shut down its operation. But here, the Board has effectively developed a rule which eviscerates this Court's important pronouncements in *Textile Workers v. Darlington Manufacturing Company*, 380 U.S. 263 (1965), and *First National Maintenance Corp. v. Nat'l Labor Relations Board*, 452 U.S. 666 (1981), and effectively avoids this Court's latest

recognition of the absolute right of an employer to determine the scope and direction of its enterprise in the related decision of *Pittsburgh L. E. R. v. Railway Execs.*, 491 U.S. 490 (1989). In effect, the Board avoids this Court's clear pronouncements that an employer has the absolute right to go out of business by ruling that such a decision cannot be implemented until and unless that employer first notifies the union of its stated intention and then bargains over the effects of that decision for some undetermined length of time prior to implementing it. Indeed, under the Board's *per se* rule adopted in *Transmarine Navigation Corp. v. American Federation of Guards*, 170 N.L.R.B. 389 (1968), the employer cannot implement a decision to cease operations until it has first bargained to an agreement with the union or bargained to an impasse – however long that may require.

This case does not involve the sale or partial sale of a business, the restructuring or transfer of operations to another entity or location, or the subcontracting of business, where prior notice might arguably be feasible or appropriate. This case involves an employer's most difficult and agonizing decision – to go out of business. As noted above, the Board of Directors of Petitioner, for the first time, on September 28, 1990, considered and then decided to cease manufacturing operations at the ARA plant. On September 28, the same day, ARA sent mailgrams to its employees and the Union representatives notifying them of this action. These notices were received on September 29, Saturday, and since the Union committee was not available to meet on that date, the effects bargaining did not commence until Monday, October 1, the next work day. Such bargaining continued during that week and at various times thereafter.

In *First National Maintenance Corp. v. N.L.R.B*, 452 U.S. 666 (1989), this Court made it very clear that an employer has absolutely no obligation to bargain with a union over its *decision* to cease operations:

> [I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. (452 U.S. at 676.)
>
> [T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(b)'s 'terms and conditions'. . . . (452 U.S. at 686.)

While the Court did hold that the employer had an obligation to engage in effects bargaining over a plant closing, it in no way indicated that an employer had to give advance notice to a union that it was contemplating such action, or that it had to delay all action and first engage in effects bargaining *before* implementing its decision. The only requirement set forth by the Court in *First National Maintenance* was that the effects bargaining be conducted "in a meaningful manner and at a meaningful time" and the Court specifically emphasized that "management may have great need for speed, flexibility and secrecy in meeting business opportunities and exigencies." 452 U.S. at 682-83. Here, the Board's requirement in its remedial order, based on *Transmarine Navigation Corp.*, is that Petitioner must first bargain to an agreement with

the union or to impasse – a process that probably would consume weeks or months.

Notwithstanding this Court's decision in *First National Maintenance*, the Board has adopted a *per se* rule which literally transforms the "meaningful manner" and "meaningful time" requirement for effects bargaining into a rigid *per se* rule that such bargaining must occur, except in "emergency" situations (whatever that might mean) *prior* to the cessation of the employer's manufacturing operations. *See, Metropolitan Teletronics Corporation v. Beddings, Curtains and Draperies Union, Local 140 United Furniture Workers of America, AFL-CIO*, 279 N.L.R.B. 957 (1986) (Chairman Dotson's dissent), enfd., 819 F.2d 1130 (lst Cir. 1987); *Los Angeles Soap Company v. Int'l Chem. Workers Union, Local 1*, 300 N.L.R.B. No. 33 (1990); *Riedel Int'l v. Inlandboatman's Union of the Pacific*, 300 N.L.R.B. No. 32 (1990).

The Board's stated position, in this case and other Board precedent cited above, is that it is not seeking to force ARA or other employers to engage in bargaining about the decision to close; rather, that it is only requiring notice and effects bargaining *before* such a decision is implemented. Obviously, this is a distinction without a difference under the facts of this case. Here, given the economic circumstances which required the Reeves Board of Directors to decide to cease manufacturing operations at ARA because of rapidly deteriorating economic conditions, the timing and need for "speed" in implementing that decision were as much a core entrepreneurial right and concern as the decision itself. In *First National Maintenance*, this Court, in discussing plant closures, observed:

> Both union and management regard control of the decision to shut down an operation with the utmost seriousness. . . . The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends, to offer concessions, information and alternatives that might be helpful to management or forestall or prevent the termination of jobs. (452 U.S. 680-681.)

Thus, the Board, by requiring both pre-implementation notice and probably long-continuing effects bargaining under the facts of this case, has accomplished for the Union what this Court has positively stated a union has no right to seek – a delay in implementing an entrepreneurial decision to close a plant.

Continuing, in *First National Maintenance*, this Court stated:

> Management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable. . . . At other times, *management may have great need for speed, flexibility and secrecy* in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. *The publicity incident* to the normal process of bargaining *may* injure the possibility of a successful transition or *increase the*

> *economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.* (452 U.S. at 682-83.) (Emphasis added.)

This Court's conclusion in *First National Maintenance* was simply that "under § 8(a)(5) bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time." (452 U.S. at 682.) The Court has never, in any way whatsoever, stated or implied that an employer is required under the law to provide a union with advance notice that it is contemplating a shutdown or partial shutdown because of economic conditions, or of the circumstances which might necessitate its decision, or that in every case effects bargaining, for some undetermined period, has to precede the implementation of any such decision.

In fact, this Court in *First National Maintenance* observed that if a union wants the right to prior notice of a decision to cease operations and related information upon which that decision is based, such a right can be obtained through contract negotiations. (452 U.S. at 682.) Although the Union here had a right to seek such concessions, there is no provision in the parties' collective bargaining agreement providing for such advance notification or information.

II. THIS COURT'S REQUIREMENT IN *FIRST NATIONAL MAINTENANCE CORPORATION V. NATIONAL LABOR RELATIONS BOARD* THAT EFFECTS BARGAINING OCCUR AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER REQUIRES DEFINITION AND AMPLIFICATION

Given the Board's erroneous interpretation of the "meaningful manner and meaningful time" conditions under which effects bargaining should occur, employers nation-wide need this Court to address this most crucial question which is left undecided by *First National Maintenance.*

In *Textile Workers v. Darlington Mfg. Co.*, 380 U. S. 263 (1965), the Court found "that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons." As in *First National Maintenance,* there was not even a hint, let alone an instruction, that an employer could not reach or implement a decision to shut down or partially shut down its business until after it had first advised the union that it was contemplating such action, and then had actually bargained for some undetermined and probably lengthy period of time about the possible effects of such possible shutdown. Research has failed to find any cases which so rule, particularly where, as here, severe and unexpected economic losses and pressures required such action. In *Darlington,* the Court simply stated:

> A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that

> it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.
>
> So far as legislative manifestation is concerned, it is sufficient to say that there is not the slightest indication in the history of the Wagner Act or of the Taft-Hartley Act that Congress envisaged any such result under either statute.

The Court has never suggested any kind of legal duty or restriction requiring that the employer delay making or implementing such decision until after it first notified the union of such possible decision, and then had in fact bargained, regardless of the time required, about its possible effects. Indeed, it is implicit in the ALJ's decision, and the Board's short-form adoption of his decision, that effects bargaining can continue for a long period of time, perhaps ending only in a bargaining impasse – a course of conduct expressly noted by the Court in *First National Maintenance*. Clearly, this is not what this Court has prescribed or endorsed.

In its recent 1989 decision in *Pittsburgh L. E. R. v . Railway Execs.*, 491 U.S. 490 (1989), the Court had before it the question of a railroad carrier's duty to bargain with various unions prior to selling substantially all of its assets to a corporation which was not yet engaged in providing rail service. There the employer had failed to notify or bargain with its employees about the effects of such sale. The Court held that the carrier was not obligated, based on its own decision to sell, to bargain about the impending sale or to delay its implementation (105 L.Ed.2d 430). It is significant that in so ruling the Court,

in reciting its earlier decision in *Darlington* (p. 433), stated:

> Although *Darlington* arose under the NLRA, we are convinced that we should be guided by the admonition in that case that the decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case.

In contrast, here, in his opinion in this case, the ALJ observed:

> [A]n employer who closes its operations has a duty to bargain with the union representing its employees over the effect on those employees 'in a meaningful manner and at a meaningful time. . . . '
>
> 'A meaningful time' has been construed as a time *prior to* the cessation of operations unless emergency circumstances preclude advance notice to the union of the planned closure and providing an opportunity to the union to seek and engage in effects bargaining. (Emphasis added)

The Board has, in this case as well as in *Los Angeles Soap Co.*, 300 N.L.R.B. No. 33 (1991); *Riedel Int'l*, 300 N.L.R.B. 32 (1990); *Metropolitan Teletronics Corp. v. Beddings, Curtains and Draperies Union, Local 140 United Furniture Workers of America, AFL-CIO*, 279 N.L.R.B. 957 (1986) and *Emsing's Supermarket, Inc. v. United Food and Commercial Worker's Union Local 146*, 284 N.L.R.B. 302 (1987),

interpreted the "meaningful time" and "meaningful manner" requirement to mean that effects bargaining must occur prior to the cessation of operations. This rule ignores the meaning and effect of prior Supreme Court decisions and effectively allows a union to usurp or substantially delay managerial decisions that lie at the core of entrepreneurial control.

The Board's *per se* rule completely ignores the issue of whether effects bargaining occurred in a meaningful manner and at a meaningful time. The Board's mandate is that effects bargaining absolutely must occur prior to the cessation of operations, absent an emergency. It appears evident that this Court intended this inquiry to be a fact question decided upon a case-by-case basis. *See, Penntech Papers, Inc. v. N.L.R.B.*, 706 F.2d 18, 27 (lst Cir. 1983); *N.L.R.B. v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286-87 (7th Cir. 1989). The Board's adoption of its *per se* rule, however, converts what was intended to be a factually intensive inquiry into a mindless "trip-wire test," by rigidly insisting that effects bargaining, regardless of the facts, must necessarily *precede* implementation of a decision to cease manufacturing operations absent emergency conditions. Obviously, under the mandate of the ALJ and the Board, effects bargaining simply cannot be "meaningful" at any other time, and under its *Transmarine* remedy, such bargaining must continue until an agreement is reached or impasse.

Clearly, that is wrong, both in logic and in law. Effects bargaining focuses on how employees are to be treated *after* closure – with regard to such matters as

severance, insurance, pensions, and other post-employment matters. Here, there is no record evidence whatsoever that suggests (and the ALJ did not find) any practical or legal impediment to meaningful effects bargaining over these issues because of the implementation of the decision to cease manufacturing operations. Indeed, it is undisputed that meaningful effects bargaining occurred immediately after the closure decision, and at a time when a number of employees continued to be employed.

III. THE DECISION IN THIS CASE IGNORES WELL-ESTABLISHED PRECEDENT THAT DECISIONS OF AN ADMINISTRATIVE AGENCY, SUCH AS THE NATIONAL LABOR RELATIONS BOARD, BE SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE

It was undisputed before the ALJ in this case that the reason for the closing of the ARA plant was pressing economic reasons – including "the severe, unexpected drop in sales commencing in August." Neither the Union nor counsel for the Board's General Counsel disputed that fact. Nevertheless, the ALJ determined that there was no factual evidence supporting the economic necessity of the shutdown. On the contrary, the *only evidence* in the record concerning the reasons for the shutdown were supplied by the Petitioner and were never disputed.

There is absolutely no evidence in the record which suggests that the Reeves Board of Directors' decision to cease operations at ARA was made prior to September 28, 1990, or that it even considered such action before that date. Here, notices were mailed to all bargaining unit

employees and Union representatives on the very day the Reeves Board made its decision. Moreover, there is nothing in the record to suggest that the Reeves Board's decision to cease its manufacturing operations was made for any reason other than ARA's rapidly deteriorating economic condition. The minutes of the Reeves Board of Director's meeting and the notices to the employees were placed in evidence by counsel for the General Counsel as part of the Board's case.

Further, there is no evidence in the record which suggests that *the timing for the implementation of the Reeves Board's decision* was dictated by any factor other than these very same pressing economic necessities. Thus, the fact that Respondent's business conditions were rapidly deteriorating is wholly uncontested. Despite this, the ALJ nevertheless found that Respondent failed to present additional evidence that "emergency circumstances" warranted the shutdown.

By this finding, the ALJ and Board ignore the decisions in *Raskin Packing v. United Food and Commercial Worker's International Union*, 246 N.L.R.B. 78 (1979); *M&M Transp. Co. v. Local 478, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 293 N.L.R.B. 73 (1975); and *National Terminal Baking Corp. v. Cake Baker's Union Local 51*, 190 N.L.R.B. 465 (1971). In each of those cases, the Board found that severe economic circumstances excused prior notice of a plant closure. Obviously, to read these cases for the proposition that an administrative law judge, the Board or a union is entitled to independently weigh all the economic circumstances facing an employer and then make an independent judgment as to whether its decision to cease its operations, or

the timing for implementation of that decision is justified by the realities of the marketplace, is to completely eviscerate the Court's opinion in *First National Maintenance*. Where drastic economic conditions force an employer to make the most painful of all decisions (to shut down its business), the timing of the implementation of that decision is as important a consideration as the decision itself. Even counsel for the Board's General Counsel admitted at the hearing:

> I am not interested in the reason of the closing but as to the timing – the reasons and the timing are so intertwined that I don't think you can separate them.

The *Raskin Packing, M&M Transp.*, and *National Terminal Baking* decisions, all hold that an employer who because of pressing economic circumstances implements a decision to close his business on the same day that decision is made, is excused from giving the union prior notice. The question of whether emergency or pressing economic circumstances exist which excuse the need for this prior notice, however, does not go to, or include, the issue of whether the economic problems facing the employer are, in the opinion of the ALJ or the Board, somehow "objectively" serious enough to warrant such drastic and immediate action. The issue is whether the reasons articulated by an employer to justify its failure to give notice of its decision prior to its implementation or partial implementation are, as recognized by this Court, reasonable in the entrepreneurial business sense. In fact, the Court, in *First National Maintenance*, suggested that the only time the Board may inquire into the motivations behind an employer's decision regarding a basic change

in the nature or scope of his enterprise is if it is done for the purposes of determining whether the employer's articulated reasons are a mere pretext designed to mask its anti-union animus and done to gain an unfair advantage or circumvent the union. (452 U.S. at 682.) Here, there is no charge and no evidence of any anti-union animus.

The ALJ's decision places inappropriate reliance on Respondent's relatively minimal "economic conditions" evidence. It is elementary that it is not Respondent's burden to prove itself innocent; but rather, it is the General Counsel's burden to adduce evidence proving the commission of an unfair labor practice. Not only did the General Counsel fail to meet this burden, General Counsel failed even to attempt to controvert Respondent's evidence of the pressing business necessity causing its decision to immediately cease operations. In fact, General Counsel thought this fact immaterial. The only evidence in the record establishes the rapidly deteriorating economic conditions that led to Respondent's drastic decision. There is no basis in the record for totally disregarding Respondent's evidence – certainly no basis whatsoever for drawing any contrary inference.

Certainly, the Minutes of the September 28 meeting of the Reeves Board of Directors constituted uncontroverted evidence of its consideration of the pressing economic problems which required drastic and immediate action. It is significant that there is absolutely no record evidence which indicates that these were not the "true" facts, or that these pressing economic problems were not the "real" reasons for the sudden vote to shut down ARA's manufacturing operations. It was widely

and frequently reported that one adverse effect of the Persian Gulf War was the great decrease in the number of automobile sales. Since the record shows that ARA was in the business of manufacturing automobile air conditioners, it is implicit that the war had a correlative adverse impact on ARA's business, as expressed in the Minutes of the Reeves Board of Directors' meeting.

In view of ARA's uncontroverted rapidly deteriorating economic condition, the Reeves Board was not required to have ARA's management advise the Union that it was considering factors which "might" result in a decision to cease ARA's manufacturing operations, and then delay for some undetermined length of time any decision or action until all the nuances of effects bargaining had taken place – including the strong possibility of lengthy bargaining to impasse. The Board's decision requiring that result simply defies reason and logic, and under the facts herein is contrary to the rationale of the expertly reasoned decisions of the Supreme Court.

The Seventh Circuit, in *Yorke v. N.L.R.B*, 709 F.2d 1138 (1983), stated as follows:

> Indeed previous Board decisions have recognized that an employer has no duty to notify a union prior to closing in an "emergency" situation. *Kingwood Mining Co. v. United Mine Workers of America*, 210 N.L.R.B. 844, 844-45 (1974) (grave economic crisis precipitated management decision to terminate mining operations and excused notice); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1970) (emergency situation precipitated by theft of Company's two delivery trucks which made continuation of the enterprise impractical). We hold that the Board's

> implicit conclusion that the Trustee was not faced with an emergency is not supported by substantial evidence.

The only evidence of emergency circumstances in the *Yorke v. N.L.R.B.* case was apparently a bankruptcy trustee's unrebutted testimony that he was aware of allegations that the former management of the company had mismanaged the company's assets, that he visited the plant and saw no employees at work, and at a creditors' meeting learned the company did not have the funds to meet the payroll and that its overall liabilities exceeded the value of its assets. There was no requirement by the court that the trustee somehow objectively demonstrate these factors, or that the trustee prove that his conclusion to terminate operations immediately was in the best interest of the company or the most prudent course of action.

It is noted that the Seventh Circuit in *Yorke* expressly held that the Board's implicit conclusion that the Trustee was not faced with an emergency situation is not supported by substantial evidence. It is submitted that here the ALJ did not have any evidence whatsoever to support his conclusion that emergency or pressing economic conditions were not present.

The best evidence of emergency or pressing economic conditions is the action of a board of directors, taken without anti-union animus (here, there is neither allegation nor proof), deciding to immediately cease manufacturing operations. No more drastic action could be taken – this is indeed the ultimate death knell.

Under the pressing adverse economic conditions present here, there was no legal duty on the part of either the

Reeves Board or ARA's management to both notify the Union representatives in advance of any possible decision, and then engage in effects bargaining before making or commencing to implement such decision. In *Rocky Mountain Hosp. v. Rocky Mountain Federation of Nurses*, 289 N.L.R.B. 1347 (1988), the Board stated "when employer action is fundamentally a classic matter of *pressing business necessities*, the *obligation to notify* a labor organization *and bargain over effects* of the action *is not present*. (Emphasis added.)

The Board's decision in *Chippewa Motor Freight v. Truck Drivers, Chauffeurs & Helpers Local Union No. 100*, 261 N.L.R.B. 455 (1982), is likewise on point. The facts in *Chippewa* are somewhat analogous to the facts here. There, the chairman of the board, when he saw the continuing trend of monthly losses, decided on a Wednesday to shut down operations on Friday two days later. In *Chippewa*, as here, the effects bargaining took place after the decision to close. There the Board adopted the ALJ's opinion, which stated:

> Whether the closing . . . be considered a partial shutdown or complete shutdown . . . the law now appears to be settled that Respondent Chippewa had no duty to bargain about the decision to close. I conclude, therefore, that this allegation of the complaint must be dismissed.
>
> It is equally settled that in either case, the Respondent Chippewa owed a legal obligation to bargain with the Charging Party Union over the effects on the employees of its decision to close the terminal. The United States Supreme Court has described this obligation as follows:

> [t]he union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by 8(a)(5) . . . . And, under 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time. . . .
>
> In my opinion, the General Counsel did not prove that Respondent Chippewa failed to fulfill this obligation. Thus, there is no evidence that Respondent Chippewa refused to meet with the Charging Party Union at reasonable times and confer in good faith concerning the effects of the closing. . . .

The Court has long recognized an employer's absolute right to cease operations. In *First National Maintenance*, the Court simply held that an employer must engage in effects bargaining at a "meaningful time." The Court did not in any way whatsoever suggest that effects bargaining must occur, and implicitly be concluded, prior to the implementation or partial implementation of any decision to cease operations, particularly where, as in this case, the decision to cease manufacturing operations and implementation of the decision occurred on the same date.

Significantly, the decision of the Reeves Board of Directors did not result in a total and immediate shutdown of all of ARA's operations. Some work continued. Approximately 21 employees were retained to perform the various kinds of work that needed to be done. There is no record evidence showing when the plant might have been fully shut down, or when any of these employees might have been terminated. Therefore, the finding that

the Union was without any position to bargain meaningfully following the decision to cease manufacturing operations is obviously incorrect and unsupported by substantial evidence on the record as a whole. Clearly, much work remained to be done, and 21 employees were retained to do that work. Contractual obligations and commitments to customers remained to be fulfilled, and it was necessary to retain employees to meet these obligations. Any company in the process of ceasing manufacturing obligations is faced with unfulfilled commitments – orders in process, the shipment of products, the liquidation of inventory, materials, and supplies, the maintenance of equipment and plant facilities, et cetera. Certainly, these conditions gave the Union a substantial position to bargain about the effects of the decision to cease manufacturing operations. The Union retained the muscle and leverage to effectively threaten or take economic action to enforce its bargaining position in the negotiations which commenced on October 1, 1990, the next work day, and continued thereafter.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant its Petition for Writ of Certiorari and, upon review, reverse the decision of the Fifth Circuit and render a decision in favor of the Petitioner, refusing to enforce the Board's order.

Respectfully submitted,

WILLIAM L. KELLER
Counsel of Record

CLARK, WEST, KELLER, BUTLER
& ELLIS, L.L.P.
4800 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2146
Telephone: (214) 741-1001
Facsimile: (214) 760-9812

Counsel for Petitioner

APPENDIX A

JD (SF) – 66 – 91
Grand Prairie, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC.

and Case 16-CA-14807

ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 300, AFL-CIO

J.O. Dodson for the General Counsel.
Jonathan L. Alder and *Martin Griffin* of *Locke, Purnell, Rain & Harrell*, of Dallas, TX, for ARA.

DECISION

Statement of the Case

GEORGE CHRISTENSEN, Administrative Law Judge: On February 26, 1991 I conducted a hearing at Forth Worth, Texas to try issues raised by a complaint issued on December 17, 1990[1] based on a charge filed by Allied Industrial Workers of America, Local 300, AFL-CIO (Union) on November 7.

The complaint alleged and the answer thereto admitted at all pertinent times Reeves Brothers, Inc., through a division known as ARA Automotive Group (Respondent), maintained facilities at various locations in the

[1] Read 1990 after further date references omitting the year.

United States to manufacture and distribute automotive parts and accessories, including a facility at Grand Prairie, Texas; that for many years prior to October 1 the Respondent recognized the Union as the exclusive collective bargaining representative of an appropriate unit of its Grand Prairie employees and was party to successive collective-bargaining agreements with the Union covering the unit employees' rates of pay, wages, hours and working conditions, including an agreement expiring October 6; and that on October 1 the Respondent closed the Grand Prairie plant and terminated the unit employees.

The complaint further alleged and the answer thereto denied the Respondent closed the Grand Prairie plant without affording the Union notice of the closure enabling the Union to bargain meaningfully over its effect on the unit employees, thereby violating Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

The issues created by the foregoing are whether the Respondent closed the plant without affording the Union notice of the closure which would enable the Union to bargain meaningfully with the Respondent over the effect of the closure on the employees represented by the Union and, if so, whether the Respondent thereby violated the Act. An ancillary issue (raised by the parties' briefs) is what remedy, if any, should be directed in the event it is decided the Respondent violated the Act.

Counsel were afforded full opportunity to present evidence, examine and cross-examine witnesses, argue and file briefs. Both counsel submitted briefs.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following:

Findings of Fact[2]

I. Jurisdiction and Labor Organization

The complaint alleged, the answer admitted and I find at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. The Unit and the Union's Representative Status

The complaint alleged, the answer admitted and I find at all pertinent times a unit consisting of all production and maintenance employees of the Respondent at its plant located at Grand Prairie, Texas, excluding all other employees, office clerical, plant clerical, professional employees, guards, watchmen, installation employees and supervisors as defined in the Act was an appropriate unit for collective bargaining purposes within the meaning of Section 9 of the Act and a majority of the Respondent's employees within that unit had designated the

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[2] While every apparent or nonapparent conflict in the evidence has not been specifically resolved below. My findings are based upon my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

Union to at [sic] as their exclusive representative for the purpose of bargaining collectively with the Respondent over their wages, hours and working conditions.

III. The Alleged Unfair Labor Practices

A. Facts

On October 6, 1987 the Respondent and the Union executed a collective-bargaining agreement for a two-year term and year to year thereafter, unless either party gave timely notice prior to October 5, 1989 or a successive year of a desire to amend or terminate. In October of 1989, the 1987-1989 agreement was extended to October 5, 1990.

In July of 1990 the Union served timely notice on the Respondent of its desire to amend the agreement.

The parties first met on September 6. The Union spokesman was Tom Mauer, president of Local 300. Also present on behalf of the Union was a district representative assigned by the International Union, Smith Harris, the chairman of the Local Union's negotiating committee, Lloyd Sheffield, and the balance of the Union's negotiating committee – Melvin Young, Sarah Mendez, Elia Bell and Molly Johnson. All but Harris were employees of the Respondent. The Respondent's spokesman was Pat Walsh, vice president for Corporate Administration, accompanied by plant manager Fred Boenker and personnel administrator Gayle Landers.[3]

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[3] The complaint alleged, the answer admitted and I find at all relevant times Walsh, Boenker and Landers were supervisors

Mauer handed Walsh a written contract proposal. The parties discussed the proposal, Mauer explaining each change the Union was proposing. Prior to the end of the meeting, the parties agreed to resume negotiations the morning of Tuesday, September 18.

On September 18 the parties resumed negotiations. Walsh gave Mauer a written counterproposal and the parties spent the day discussing its terms. Prior to parting, the parties agreed to next meet on September 28.[4]

During the week in which the second meeting took place (the week of September 17-21) and the following week (September 24-28) the owners of the parent corporation reviewed and discussed the division's problems with their managers and what to do about them.[5]

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and agents acting on Respondent's behalf within the meaning of Section 2 of the Act.

[4] Both meetings, in accord with past practice, were held on the Respondent's premises at Grand Prairie during working hours. The employee-participants were compensated at their normal rates of pay for the time spent in negotiations.

[5] The minutes of the September 28 meeting of the Reeves Board of Directors recites: "The Board reviewed the events of the past two weeks during which the senior management of ARA Automotive Group made detailed presentations in Connecticut on ARA's performance. . . . The Board reviewed, among other things, the severe, unexpected drop in sales commencing in August and the reasons therefore. The revised projections that had been presented for ARA's business for the balance of 1990 and the impact of events in the Middle East on ARA's business and the U.S. economy. The Board also discussed various alternatives in lieu of ceasing operations at ARA and terminating production. . . .

Walsh did not inform the Union committee at any time during the September 6 or the September 18 negotiations the Respondent's owners were considering plant closure and other alternatives to resolve the division's alleged economic problems.

The Sunday following the September 18 negotiations, Walsh flew to Darien, Connecticut to present and discuss proposals for resolving the alleged problems.[6]

On September 24 Walsh telephoned Woods and instructed her: to telephone Harris; to advise Harris he was unable to resume negotiations on September 28 because he would still be in Darien that day; and to ask Harris if the negotiations could be rescheduled to Saturday, September 29.[7] Woods telephoned Harris' home and asked his wife to have Harris telephone her, the Respondent needed to reschedule the negotiations set to resume September 28. When Harris returned her call, she informed Harris that Walsh would not be returning to Grand Prairie until about midnight on September 28 and wanted to resume negotiations on September 29 instead of September 28. Harris responded he would have to consult with the committee members. She asked him to call her back after his consultation. He returned her call the next day and informed her the committee was not willing to meet on September 29.

Both Harris and plant manager Boenker informer [sic] Mauer the September 28 meeting was cancelled with

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[6] His secretary, Rebecca Woods, so testified.

[7] A day for which the employee-members of the committee would not be compensated for time spent in negotiations.

Boenker advising Mauer on September 28 he knew nothing about any September 29 meeting.

The owners of the parent corporation completed their review of the division's problems on September 28 and took the following action:

> RESOLVED, that the Board of Directors has determined that it is in the best interests of Reeves Brothers that all manufacturing operations at ARA Automotive Group cease effective immediately and corresponding reductions in salaried and support personnel be implemented.
>
> FURTHER, RESOLVED, that the officers of ARA Automotive Group be and hereby are authorized and directed to implement the foregoing resolution in accordance with the presentation that had been submitted by ARA's management.
>
> * * *
>
> RESOLVED, that the ARA Automotive Group is to be offered for sale in whole or in part and that Mr. Steven W. Hart is authorized and directed to retain such investment bankers, accountants, and/or other firms as shall be necessary or desirable to assist in the sale of ARA.

No employees were scheduled to work on September 29. On that date all the bargaining unit employees received Western Union mailgrams from the Respondent stating:

> AS A RESULT OF RECENT EVENTS IN THE MIDDLE EAST CAUSING SIGNIFICANT CHANGES IN THE PREVAILING ECONOMIC CONDITIONS IN THE UNITED STATES AND A SEVERE DROP IN ARA'S SALES DURING AUGUST AND SEPTEMBER, 1990, ALL ARA

PLANT EMPLOYEES HAVE BEEN PLACED ON INDEFINITE LAYOFF EFFECTIVE IMMEDIATELY.

YOU SHOULD THEREFORE NOT REPORT FOR WORK UNTIL FURTHER NOTICE.

YOUR CHECK FOR THE WEEK ENDING SEPTEMBER 28, 1990 WILL BE MAILED TO YOU WITHIN THE NEXT WEEK. WE WILL BE MEETING WITH YOUR UNION REPRESENTATIVES TO DISCUSS OTHER DETAILS OF YOUR EMPLOYMENT AND YOU WILL BE ADVISED ACCORDINGLY.

No Union representative was aware the Respondent was considering the shutdown of the division (among other alternatives) prior to the unit employees' (including Mauer and the balance of the Union committee) receipt of the mailgrams.

Mauer informed Harris of the contents of the mailgram he received and attempted to contact management at the Grand Prairie plant but found the telephones were not manned. The Union representatives decided to appear at the plant on Monday, October 1 at shift starting time and seek clarification of the situation.

On October 1, Harris, Mauer and about 50 employees appeared at the plant and were denied admission. A guard subsequently asked for Harris and, when Harris identified himself, stated Walsh wanted to see him and escorted Harris into the plant. On his arrival at Walsh's office, Walsh handed Harris a letter which read as follows:

> As a result of recent events in the Middle East causing significant changes in prevailing economic conditions in the United States and a severe drop in ARA's sales during August and September, 1990, ARA must curtail production immediately and has ordered a closing of its facility at 602 Fountain Parkway, Grand Prairie, Texas. Although there may be a recall of a small number of employees needed to complete some production, ARA has determined that the facility will be closed when such production is completed at the site.
>
> Because of these sudden and unforeseen business circumstances, ARA was unable to give a full 60 days advance notice of its actions. The separations will occur Monday, October 1, 1990 and employees have been notified not to report to work until advised otherwise. Subject to the possible recall noted above, the termination includes the employees listed on Schedule A attached to this letter.
>
> In the event you wish to receive further information with respect to this matter, you should contact Patrick M. Walsh, Vice President Administration at (214) 647-4111.

Harris, Mauer and Sheffield subsequently received identical letters at their home addresses.[8]

Walsh also informed Harris the Respondent on September 28 decided to shut down and terminate all the

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[8] The Respondent was aware of the home addresses of the three and their telephone numbers during the entire period plant closure was under consideration. As noted heretofore, however, their notices of the closure were received the day after the last day the plant was in operation.

employees in the division and to sell its products, inventory and assets but was prepared to utilize some of the unit employees in completing the shutdown at Grand Prairie.[9]

Representatives of the Respondent met with representatives of the Union on October 1 and subsequently, discussed the Union's complaints over the failure of the Respondent to give the Union any notice of its planned shutdown and an opportunity to engage in meaningful negotiations over the effect of the planned shutdown on the unit employees prior to the shutdown, along with other subjects, plus the Union's request for factual information.[10]

The Respondent has not resumed operations at the Grand Prairie facilities since the shutdown, nor has the Union received all the information it requested.

B. Analysis and Conclusions

First National Maintenance[11] established the principle an employer is not obligated to bargain with the union representing its employees over a decision to cease operations. The Court also ruled, however, an employer who

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[9] The Respondent recalled approximately 21 maintenance and shipping employees for a short period (in accordance with the seniority provisions of the unexpired collective-bargaining agreement).

[10] The Union requested factual information verifying the Respondent's alleged reasons for the shutdown.

[11] *First National Maintenance Corp. v NLRB*, 452 U.S. 666 (1981).

closes its operations has a duty to bargain with the union representing its employees over the effect on those employees "in a meaningful manner and at a meaningful time."[12]

"A meaningful time" has been construed as a time *prior to* the cessation of operations[13] unless emergency circumstances preclude advance notice to the Union of the planned closure and providing an opportunity to the Union to seek and engage in effects bargaining.[14]

In this case the Respondent was discussing the shutdown over at least a two-week period prior to its effectuation and one of the division's officers privy to those discussions (Walsh) was meeting with the Union in ostensible negotiations for a successor collective-bargaining agreement. Yet the Union neither was notified the Respondent was considering a shutdown nor afforded an opportunity to bargain over its effects upon the unit employees represented by the Union until the shutdown was an accomplished fact. These factors establish and I

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[12] 452 U.S. 681-682.

[13] *Los Angeles Soap Co.*, 300 NLRB No. 33 (1991); *Riedel International*, 300 NLRB No. 32 (1990); *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986), enfd. 819 F.2d 1130 (1st Cir. 1987); *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

[14] *Raskin Packing Co.*, 246 NLRB 78 (1979); *M & M Transportation Co.*, 293 NLRB 73 (1975); *National Terminal Baking Corp.*, 190 NLRB 465 (1971).

find constitute a clear violation of Section 8(a)(1) and (5) of the Act under the cases cited above.[15]

Conclusions of Law

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Pat Walsh was the Respondent's vice president for Corporate Administration, Fred Boenker was the Respondent's plant manager, Gayle Landers was the Respondent's personnel administrator, and all three were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. At all pertinent times the Union was the duly designated exclusive collective bargaining representative of a majority of the Respondent's employees within a unit appropriate for collective bargaining purposes within the meaning of Section 9 of the Act consisting of:

> All production and maintenance employees of the Respondent at its plant located at Grand Prairie, Texas, excluding all other employees,

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[15] The Respondent contends "emergency circumstances" warranted the shutdown (relying on the recitations advanced in its notices to the unit employees and the Union). Those recited reasons were not supported by any factual evidence either supplied to the Union or produced at the hearing (on the ground such factual evidence was "confidential"). In the absence of such evidence, I reject the contention.

> including office clerical, plant clerical, professional employees, guards, watchmen, installation employees and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to engage in effects bargaining with the Union prior to shutting down its Grand Prairie, Texas plant.

5. The unfair labor practice just described affected interstate commerce within the meaning of Section 2 of the Act.

The Remedy

In *Transmarine Transportation Corp.*, 170 NLRB 389 (1968), after finding the employer violated Section 8(a)(1) and (5) of the Act by closing its terminal and terminating its union-represented guards without affording the union an opportunity to bargain over the effects of the closure and terminations on the employees represented by the union, the Board stated:

> It is apparent that, as a result of the Respondent's unlawful failure to bargain about such effects, the Respondent's guards were denied an opportunity to bargain through their contractual representative *at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs were being terminated.* . . . Under the circumstances . . . it is impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation.

* * *

> Therefore, in order to assure meaningful bargaining and to effectuate the purposes of the Act, we shall accompany our order to bargain over the effects of the shutdown with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining power is not entirely devoid of economic consequences for the Respondent. (Emphasis added.)

In subsequent effects bargaining cases, the Board consistently has ordered employers to comply with the *Transmarine* remedy, refining its reasons therefor. For example, in *National Car Rental System, Inc.*, 252 NLRB 159 (1980) at 163, the Board stated:

> During negotiations with Champion (a union representative), Respondent failed to inform the Union or the employees that the jobs of the unit employees were in jeopardy. . . . The first the Union or the employees heard of the closing of the Newark facility was on February 22, simultaneously with the notification that the entire unit was being terminated. . . . the Union immediately contested the propriety of the Respondent's precipitous announcement that all employees were being terminated, but was told it had no control in the situation. Had Respondent not announced the closing and terminations as a fait accompli, it is clear the Union could have offered various proposals. . . . Respondent's announcement, however, precluded such a request and clearly indicated that any attempt at bargaining would have been futile.

In further explication, the Board has stated:

> With respect to Contris' unlawful failure to bargain with the Union about the effects of its decision to close its Wentzville, Missouri plant, the terminated employees have been denied an opportunity to bargain through their collective bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.
>
> Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of the shutdown on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent.[16]

More recently, in *Louisiana Dock Co.*, 293 NLRB No. 21 (1989), at pages 12 and 13 of its slip opinion, the Board explained that:

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[16] *Contris Packing Co.*, 268 NLRB 193 (1983) at 196 (repeated in almost identical language. *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986) at 960).

> In cases in which an employer has failed to provide its employees' bargaining representative *with an opportunity to engage in effects* bargaining . . . the Board traditionally has imposed a limited backpay requirement and an order that the parties bargain over these effects. (Citing cases) In fashioning this remedy, the Board has specifically found that in order to assure meaningful bargaining a limited backpay requirement is needed. In view of the Board's recognition that such a backpay award is a necessary precondition for meaningful bargaining, we find that whatever bargaining the Union and LDC had engaged in regarding the effects of the layoffs *after the layoffs had occurred* is inadequate to fulfill LDC's affirmative obligations in this regard. (Emphasis added.)

further ruling in *Riedel International,* 300 NLRB No. 32 (1990), that when:

> The judge found that the Respondent failed and refused to bargain in good faith within the meaning of Section 8(a)(5) of the Act concerning the effects of its decision to sell Willamette by failing to notify the Union of the decision until the day of the implementation of the decision, when it was virtually a fait accompli.
>
> * * *
>
> We agree with the judge that the Respondent presented the Union with a fait accompli concerning its cessation of operations and termination of employees in a manner that was in derogation of its obligation to notify and bargain in advance with the Union about the effects of these events.

* * *

> We find a violation in the Respondent's failure to provide any meaningful prior notice to the Union that it was ceasing business and terminating employees. . . . That circumstances may compel confidentiality . . . does not obviate the employer's duty to give pre-implementation notice to the union to allow time for effects bargaining. . . . Thus, the Union here was entitled as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time. (Citing cases) We need not decide exactly how many days' notice would be required for such a meaningful opportunity; we find the Respondent's same day notice clearly insufficient. (Emphasis added.)

The Respondent argues the *Transmarine* remedy is inappropriate in this case, inasmuch as it notified the Union of its decision to shut down and to terminate the employees the Union represented the day after it made the decision to cease operations in Grand Prairie and commenced negotiations with the Union concerning the effects of the shutdown the next workday.

The cases recited above clearly reject that argument; the Respondent at no time during the contract negotiations preceding the shutdown gave the Union or the unit employees any indication it was considering the shutdown of the Grand Prairie plant, thus denying the Union an opportunity, at a time when it still possessed some bargaining strength to advance proposals designed to alleviate the effect of a shutdown on the unit employees, such as 30 days' notice prior to termination, severance

pay, continuation of health benefits for a reasonable time, etc. Rather, the Respondent confronted the Union and the unit employees with a fait accompli, with the Union and the employees possessing little or no bargaining power thereafter to secure some concessions.

The Respondent also contends since it met with the Union the first working day following the shutdown and prior to the date the Union filed the charge which led to this proceeding, the *Transmarine* remedy is applicable, citing *Thompson Transport Co.*, 184 NLRB 38 (1970).

In *Thompson*, the employer notified the Union of its intention to cease operations prior to doing so, but refused the union's request for effects bargaining prior to the closure and did not offer to bargain with the union until five weeks after the closure (after which the parties bargained to impasse). On these facts, the Board held further bargaining would be futile and ordered the employer to place the terminated employees on a preferential hiring list and pay them five weeks of backpay, i.e., for the period between the date operations ceased and the date effects bargaining commenced.

Applying the formula here would result in no backpay whatsoever.

Thompson was a 1970 decision, made no reference to *Transmarine*, a 1968 decision, and cannot be reconciled with the principles enunciated in the later-decided cases cited above, i.e., that an employer should not escape economic consequences when, as here, the employer's failure to afford the Union representative and its employees meaningful bargaining at a meaningful time by failing to provide the Union notice and an opportunity

to engage in effects bargaining *prior to* a shutdown, when the Union still possesses some bargaining power.

I therefore reject the Respondent's contention and recommend the issuance of the traditional *Transmarine* remedy in this case, i.e., I recommend the Respondent be directed to cease and desist from committing the unfair labor practices enumerated above and pay backpay to the employees represented by the Union from five days after the date of this Decision and Order case until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on subjects pertaining to the effects of plant closing; (2) a bona fide impasse in bargaining; (3) the Union's failure to commence bargaining within five days of the date of this Decision or to commence bargaining within five days of its receipt of notice from the Respondent of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to any of those employees exceed the amount they would have earned as wages from September 28, 1990 to the time they secured equivalent employment elsewhere or the date on which the Respondent offers to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the wages these employees would have earned for a two-week period at the rate of their normal wages when last in the Respondent's employ.

Backpay shall be based on the earnings the terminated employees would have received during the applicable period, less net interim earnings, with the sums due calculated in the manner set out in *F.W. Woolworth Co.*, 90

NLRB 289, plus interest thereon calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:[17]

ORDER

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Failing to bargain in good faith with ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 300, AFL-CIO concerning the effects on employees represented by that Union of its shutdown of its plant at Grand Prairie, Texas;

b. In any like or related manner interfering with, restraining or coercing employees exercising rights protected by the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

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[17] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. On request, bargain collectively in good faith with Local 300 over the effects on the employees represented by Local 300 of its shutdown of its Grand Prairie, Texas plant and termination of its employees represented by Local 300;

b. Pay the employees represented by Local 300 who were terminated on and after September 29, 1990 their normal wages for the appropriate period set forth in "The Remedy" section of this Decision and Order;

c. Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under this Order;

d. Sign and mail copies of the attached notice marked "Appendix"[18] to all employees represented by the Union who were terminated on and after September 29, 1990 to their last known addresses and sign and mail a copy to the Union at its business address;

---

[18] If this Order is enforced by a Judgment of the United States Court of Appeals. The words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

e. Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, that steps have been taken to comply with the Order.

Dated: June 12, 1991 /s/ George Christensen
GEORGE CHRISTENSEN
Administrative Law Judge

JD(SF) – 66 – 91

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board found we violated the National Labor Relations Act and ordered us to comply with the following:

WE WILL NOT fail or refuse to give notice of the shutdown of our plants to the Union or unions representing our employees there in ample time prior to such shutdown to afford such unions the opportunity to engage in meaningful bargaining over the effects of the shutdown on the employees represented by those unions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the Act.

WE WILL, upon request, bargain collectively in good faith with ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 300, AFL-CIO over the effects of our shutdown of our Grand Prairie, Texas plant on our employees represented by Local 300.

WE WILL pay backpay to the employees represented by Local 300 who were terminated when we shut down our Grand Prairie, Texas plant as specified in the Board's Order, with interest on the sums due.

ARA AUTOMOTIVE GROUP,
DIVISION OF REEVES BROTHERS,
INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 819 Taylor Street, Room 8A24, Fort Worth, TX 76102-2649; Telephone: (817) 334-2941.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARA AUTOMOTIVE GROUP,
DIVISION OF
REEVES BROTHERS, INC.

and

ALLIED INDUSTRIAL WORKERS
OF AMERICA, LOCAL 300,
AFL - CIO

Case 16 -
CA -14807

DECISION AND ORDER

On June 12, 1991, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions

---

[1] The citation for *M & M Transportation Co.* in fn. 14 of the judge's decision is corrected to read "239 NLRB 73 (1978)," and the case name cited in the first paragraph in the "remedy" section of his decision is corrected to read *"Transmarine Navigation Corp."* Also, item (3) in the antepenultimate paragraph of the remedy section of the judge's decision should read, "the Union's failure to *request* bargaining within 5 days of the date of this Decision . . . " (emphasis added).

and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, ARA Automotive Group, Division of Reeves Brothers, Inc., Grand Prairie, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 6, 1992.

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[2] The Respondent contends that the Union was in a position to bargain meaningfully during the period in which the Respondent retained certain of the unit employees to assist in the process of plant closure and, therefore, the customary *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), remedy for an effects-bargaining violation is not appropriate. We find this argument without merit. See *Los Angeles Soap Co.*, 300 NLRB No. 33, JD slip op. at 20 fn. 7 (Sept. 28, 1990).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4798

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

ARA AUTOMOTIVE GROUP, DIVISION
OF REEVES BROTHERS, INC.,

Respondent.

Application for Enforcement of an Order of the
National Labor Relations Board

(16-CA-14807)

(Filed Apr. 12, 1993)

Before POLITZ, Chief Judge, DUHE, Circuit Judge, and BELEW*, District Judge.

PER CURIAM:**

---

*Senior District Judge of the Northern District of Texas, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

ENFORCED. See Loc. R. 47.6.

Costs are to be taxed against respondent.

ISSUED AS MANDATE: MAY 19, 1993

Supreme Court, U.S.
FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 93-47

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to close its Grand Prairie plant without giving the Union timely notice and opportunity to bargain over the effects of the closing on employees represented by the Union.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-47

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A26-A27) is unpublished, but the judgment is noted at 990 F.2d 1252 (Table). The decision and order of the National Labor Relations Board (Pet. App. A24-A25), including the decision of the Administrative Law Judge (Pet. App. A1-A23), is reported at 306 N.L.R.B. 610.

JURISDICTION

The judgment of the court of appeals (Pet. App. A26-A27) was entered on April 12, 1993. The petition for a writ of certiorari was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and distributes automotive parts at plants in the United States, including one in Grand Prairie, Texas, where it manufactured air-conditioning equipment until it closed the plant on September 30, 1990. Pet. App. A1-A2. Petitioner's Grand Prairie employees were represented by the Allied Industrial Workers of America, Local 300, AFL-CIO. *Id.* at A2.

On September 6, 1990, the Union began negotiations with petitioner to amend the existing collective bargaining agreement. The parties met for a second time on September 18 and agreed to another meeting on September 28. Pet. App. A4-A5.

Meanwhile, between Monday, September 17, and Friday, September 28, petitioner's board of directors met at its headquarters in Darien, Connecticut, to consider various options, including the closing of plants, to address its economic problems. Pet. App. A5-A6. On September 24, petitioner called the Union to postpone the negotiating session scheduled for September 28. However, petitioner never informed the Union that it was having economic problems or that its board of directors was considering the possibility of closing the Grand Prairie plant. *Id.* at A6.

On September 28, the board of directors decided to cease manufacturing operations at ARA Automotive Group effective immediately and to try to sell that operation. Pet. App. A7. On Saturday, September 29, a non-workday, each of the bargaining unit employees received the following mailgram (*id.* at A7-A8):

> As a result of recent events in the Middle East causing significant changes in the prevailing economic conditions in the United States and a

> severe drop in ARA's sales during August and September, 1990, all ARA plant employees have been placed on indefinite layoff effective immediately.
>
> You should therefore not report for work until further notice.
>
> * * * We will be meeting with your union representatives to discuss other details of your employment and you will be advised accordingly.

Employee Mauer called International Union Representative Harris, who had not received the mailgram, to tell him about the plant closure and terminations. This telephone call was the first notice to any union official of a plant shutdown. Pet. App. A8. On Monday, October 1, Harris and a group of employees went to the plant to get more information. They were denied entry by security guards. Shortly thereafter, a guard escorted Harris into the plant, where petitioner's vice president handed him a letter dated September 28. The letter averred that petitioner was closing because of events in the Middle East and a severe drop in sales; it blamed "these sudden and unforeseen business circumstances" for its failure to give "advance notice" of the decision to close. Attached to the letter was a list of the terminated employees. *Id.* at A8-A9.

Also on October 1, the Union's negotiating committee met with petitioner's representatives. The Union complained about the lack of notice of the planned shutdown and petitioner's failure to give it an opportunity to bargain meaningfully over its effects on the employees. Pet. App. A10.

On October 2, the parties met and reached agreement on the temporary recall of approximately 21 maintenance and shipping employees to assist with the shutdown. Pet. App. A10 n.9; Tr. 45-46.[1] In a meeting on October 5, the Union presented a proposal for a shutdown agreement and a request for information relating to the plant closing. Tr. 46-49, 57-58. The Union never received all the requested information. Pet. App. A10. The parties met twice more, on November 9, 1990, and on January 10, 1991. Tr. 50.

2. The ALJ, whose decision was affirmed by the Board, concluded that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to close its Grand Prairie plant without giving the Union timely notice and an opportunity to bargain over the effects of the closing on unit employees. Pet. App. A11-A12, A24-A25.

The ALJ, quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681-682 (1981), explained that "an employer who closes its operations has a duty to bargain with the union representing its employees over the effect on those employees 'in a meaningful manner and at a meaningful time.'" Pet. App. A10-A11. The ALJ further noted that the requirement to bargain at "a meaningful time" contemplates that bargaining will take place "*prior to* the cessation of operations unless emergency circumstances preclude advance notice to the Union of the planned closure." *Id.* at A11. (footnote omitted).

The ALJ pointed out that petitioner "discuss[ed] the shutdown over at least a two-week period prior to

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[1] Tr. references are to the transcript of the hearing before the Administrative Law Judge (ALJ).

its effectuation" while at the same time it was engaged in "ostensible" bargaining negotiations with the Union. Pet. App. A11. The ALJ rejected petitioner's contention that "emergency circumstances" precluded advance notice. The ALJ noted that the alleged emergency circumstances—a severe drop in sales due to conditions in the Middle East—"were not supported by any factual evidence either supplied to the Union or produced at the hearing (on the ground such factual evidence was 'confidential')." *Id.* at A12 n.15.

The Board ordered petitioner, *inter alia*, to bargain with the Union, upon its request, over the effects of its plant shutdown and to pay wages to all terminated bargaining unit employees for a minimum of two weeks, in accordance with the remedy fashioned in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), on remand from *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967). The Board rejected petitioner's contention that the *Transmarine* remedy was not appropriate because "the Union was in a position to bargain meaningfully during the period in which [petitioner] retained certain of the unit employees to assist in the process of plant closure." Pet. App. A25 n.2.

3. The court of appeals enforced the Board's order in an unpublished order. Pet. App. A26-A27.

ARGUMENT

The Board's decision, upheld by the court of appeals, is consistent with this Court's decision in *First National Maintenance* and does not conflict with any decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Although the decision to close part of an employer's business for economic reasons is not a mandatory subject of bargaining, the employer must bargain in good faith with the employees' representative about the effects of the decision "in a meaningful manner and at a meaningful time." *First National Maintenance*, 452 U.S. at 681-682. An essential element of "meaningful" bargaining is "timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible." *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 26 (1st Cir.), cert. denied, 464 U.S. 892 (1983). "Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision [to close] to allow reasonable scope for bargaining." *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 917, 919 (D.C. Cir. 1972). Accord *Kirkwood Fabricators, Inc.* v. *NLRB*, 862 F.2d 1303, 1306-1307 & n.1 (8th Cir. 1988); *NLRB* v. *Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286 (7th Cir. 1989); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 958-959 & n.14 (1986), enforced mem., 819 F.2d 1130 (2d Cir. 1987).

The Board and the courts recognize that a union is deprived of much of its bargaining power when it has no opportunity to bargain about the effects of a plant closing until after the plant is closed. For this reason, the Board requires that "absent special justification, pre-implementation notice is required to satisfy the obligation to bargain over effects." *Metropolitan Teletronics*, 279 N.L.R.B. at 959 n.14. Accord *Kirkwood Fabricators, Inc.*, 285 N.L.R.B. 33, 35 (1987), enforced, 862 F.2d 1303, 1307 (8th Cir. 1988); *Transmarine Navigation*, 170 N.L.R.B. at 389;

Riedel International d/b/a Willamette Tug & Barge Co., 300 N.L.R.B. 282, 283 (1990).[2]

Contrary to petitioner's assertion (Pet. 6-9), the Board has made clear that "[t]he rule regarding timely [pre-implementation] notice is not a per se rule. An employer can avoid [Section] 8(a)(5) liability by demonstrating that emergency circumstances justified late notice to the union." *Metropolitan Teletronics*, 279 N.L.R.B. at 959. See, for example, *Raskin Packing Co.*, 246 N.L.R.B. 78, 78 (1979) (immediate closure necessitated by bank's refusal to continue extending line of credit); *M&M Transportation Co.*, 239 N.L.R.B. 73, 74, 75 (1978) (inability to pay employees due to denial of bank loan); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) (theft of employer's two trucks precluded continued operation of business). And see *Creasey Co.*, 268 N.L.R.B. 1425 (1984) (need to dispose of perishable inventory justified delayed notice).[3]

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[2] Significantly, employers of 100 or more employees are now required by law to give their employees 60 days' advance notice of partial or complete closure. See Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, § 3(a), 102 Stat. 891. As the Eighth Circuit observed, "The fact that Congress itself determined [advance] notification should be required lends support to the proposition that the Board's determination [of a duty to allow effects bargaining prior to closure] is reasonably defensible." *Kirkwood Fabricators*, 862 F.2d at 1307 n.1.

[3] Serious financial problems alone are not sufficient justification for lack of pre-implementation notice. See, for example, *Los Angeles Soap Co.*, 300 N.L.R.B. 289, 294-296 (1990) ("undeniable financial problems" no defense to failure to give sufficient advance notice); *NLRB* v. *Emsing's Supermarket, Inc.*, 872 F.2d at 1286-1287 (failure to give timely notice not justified where there was "steady erosion of [employer's]

2. Petitioner contends (Pet. 8, 11) that the Board's decision is at odds with the Court's decision in *First National Maintenance*, which, according to petitioner, does not support the position that advance notice and opportunity to bargain over the effects of a decision to close is required by the Act. There is no merit to that contention.

Petitioner asserts (Pet. 9-11) that the Court's concern in *First National Maintenance* that requiring bargaining over a decision to close a plant would cause unwarranted delay in implementing the decision is equally applicable to pre-implementation effects bargaining.[4] However, the Court in *First National Maintenance* expressly observed that even though a union could not demand bargaining over a decision to close, effects bargaining could serve as well as decision bargaining to facilitate an exchange of information and offers between the parties that "might be helpful to management or forestall or prevent the termination of jobs." 452 U.S. at 681. The Court added that the union was entitled to a "significant opportunity to bargain about * * * job security as part of the 'effects' bargaining mandated

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financial well-being" but no "immediate financial emergency"); *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d at 27 (same-day notice not justified despite losses of more than a million dollars during the past three months). See also *Riedel International d/b/a Willamette Tug & Barge Co.*, 300 N.L.R.B. at 282-283 (employer's interest in best sales price did not excuse failure to tell union about sale until effective date of transfer).

[4] Petitioner complains (Pet. 8-9) that effects bargaining "probably would consume weeks or months." However, as this Court has noted, the Act does not require "fruitless marathon discussions." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 214 (1964).

by § 8(a)(5) * * * and the Board may impose sanctions to insure its adequacy." *Id.* at 681-682. In light of the union's right to engage in timely effects bargaining, the Court observed that "although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered." *Id.* at 682. Plainly, a union cannot ensure such deliberate consideration if its first opportunity for effects bargaining arises after the closure decision has been implemented.

Petitioner errs in relying (Pet. 12-15) on *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), and *Pittsburgh & L.E.R.R.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989). *Darlington* did not involve any issue of effects bargaining; there the Court held that an employer has the absolute right to close down its business entirely. 380 U.S. at 268. In *Pittsburgh & L.E.R.R.*, the Court held that the decision of an employer to quit the railroad business by sale of the railroad could not be enjoined pending bargaining over the effects of the sale, where the injunction would effectively preclude the sale. 491 U.S. at 507, 511. In *Pittsburgh & L.E.R.R.*, the Court rejected the position that the employer had a duty under the Railway Labor Act to bargain over the effects its decision to sell the railroad would have on its employees. 491 U.S. at 503-504. While the Court in *Pittsburgh & L.E.R.R.* cited *Darlington* and *First National Maintenance* for the propositions that an employer has the right to go out of business and need not bargain about the decision to do so (491 U.S. at 507-508 & n.17), it did not question that the National

Labor Relations Act requires effects bargaining over a decision to close a plant. See *id.* at 508 n.17.

3. Petitioner's final contention—that the Board's determination is not supported by substantial evidence (Pet. 16-24)—raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). In any event, there is no merit to that contention.

Petitioner argues (Pet. 17) that "there is nothing in the record to suggest that the Reeves Board's decision to cease its manufacturing operations was made for any reason other than ARA's rapidly deteriorating economic condition." But the issue here is not whether petitioner's decision to close the plant was based on economic considerations, but whether petitioner was justified in implementing that decision before bargaining with the Union over its effects. At the hearing, the only evidence adduced by petitioner to justify its conduct was its September 28 mailgram to the employees, its October 1 letter to the Union, and the minutes of the September 28 meeting of Reeves' board of directors. None of those documents goes beyond references to "recent events in the Middle East" and allegations of a severe drop in ARA's sales during August and September 1990. As the ALJ noted, the reasons cited by petitioner "were not supported by any factual evidence either supplied to the Union or produced at the hearing (on the ground such factual evidence was 'confidential')." Pet. App. A12 n.15. Indeed, in its brief to the court of appeals and in its petition for certiorari, petitioner concedes that it provided "relatively minimal" evidence of any necessity for an immediate shutdown of the Grand Prairie plant. See Pet'r C.A. Br. 19; Pet.

19. Petitioner essentially contends that the Board should have found that emergency circumstances justified the immediate closing of the plant simply because its directors decided to shut down the plant immediately.[5]

The Board cases relied on by petitioner (Pet. 17-18) are factually distinguishable. Thus, in *Raskin Packing Co.*, 246 N.L.R.B. at 78, the Board found that a bank's discontinuance of the employer's line of credit necessitated immediate closing of the business. In *M&M Transportation Co.*, 239 N.L.R.B. at 75, the immediate closing was justified because the employer lacked funds to pay its employees. And in *National Terminal Baking Corp.*, 190 N.L.R.B. at 467, the theft of the company's delivery trucks was a "calamitous event" that necessitated an immediate shutdown.[6]

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[5] Petitioner errs in asserting (Pet. 19) that the General Counsel had the burden of proving that petitioner's economic conditions did not justify its failure to bargain with the Union prior to implementation. The Board's position that the employer bears the burden of justifying its failure to give advance notice of a closure decision flows from the "accepted proposition of law that 'the burden of proof on matters which relate to justification for the employer's actions rests with the employer.'" *Van Dorn Plastic Machinery Co.* v. *NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) (unilateral change in working conditions). Accord *Metropolitan Teletronics*, 279 N.L.R.B. at 959; *Stamping Specialty Co.*, 294 N.L.R.B. 703, 703 (1989).

[6] In *Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 456 (1982), while the union received only two days' notice of the employer's decision to close, the union had been aware of the employer's financial difficulties for a year and had rebuffed the employer's efforts to negotiate reductions in its labor costs. *Id.* at 459-460. *Rocky Mountain Hospital*, 289 N.L.R.B. 1370, 1371 (1988), did not involve a business shutdown. Moreover, there

Petitioner similarly errs in relying (Pet. 20-21) on *Yorke* v. *NLRB*, 709 F.2d 1138, 1144 (7th Cir. 1983), cert. denied, 465 U.S. 1023 (1984). Petitioner asserts that, unlike here, the Seventh Circuit in *Yorke* simply accepted the contention that it was in the employer's best interest to close the business immediately. However, in *Yorke* the court of appeals found that lack of funds to meet the payroll created an emergency situation justifying the failure of the bankruptcy trustee to give advance notice of the closure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

AUGUST 1993

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the Board reversed the ALJ's finding that adverse circumstances justified the employer's unilateral changes in working conditions.